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### Asylum, Immigration, and Gender Identity: Scholarship and Strategies for Advocacy

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## Asylum, Immigration, and Gender Identity: Scholarship and Strategies for Advocacy

Margaret (Meg) Butler\*

Legal issues related to immigration and gender identity are a burgeoning area of scholarship. Student notes and comments dominate the area, though there are a few scholars and organizations that are publishing articles and studies as well. As a developing area, many contributions are forced to include definitions of gender and sexual orientation, clarifying the distinction between the two for readers who may be unfamiliar with the definitions. As the scholarship matures and greater consensus develops about the definitions, it may be less necessary to include such basic definitions prior to addressing serious legal issues and concerns.

The scholarship focuses particularly on the difficulties experienced by immigrants who seek asylum, including the experiences of those who are in detention facilities managed by U.S. Immigration and Customs Enforcement (ICE). Many authors describe the difficulties experienced by asylum applicants and other immigrants. For example, applicants are often encouraged to identify as “a gay man with a female sexual identity,”<sup>1</sup> rather than as a transgender person. Articles often include recommendations for improved practices or changes in the law that would result in more just outcomes.

Opportunities for contribution to scholarship in this area vary. One area for analysis would be the ways in which changes to federal marriage law validating same-sex marriage affect family-based immigration when family member(s) identify as transgender. Others may prefer to analyze the focus of legal advocacy efforts under justice- and rights-based theories. There are also opportunities to consider gender identity and immigration issues through the lenses of health care, asylum and international law, and due process.

To locate articles in a full-text legal database, useful search terms may include *transsexual*, *transgender*, “*gender identity*”, *LGBT* or *LGBTQ*, *gender-conforming* or *gender nonconforming*, or *trans*, in addition to immigration-focused terms such as *immigrate*, *asylum*, *refugee*, *detention*,

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<sup>1</sup> *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1087 (9th Cir. 2000), overruled by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

*torture, persecution, removal, and “particular social group.”* Also possibly useful are the popular names of laws or agencies, such as the *Immigration and Nationality Act* (INA), the *REAL ID Act*, the *Convention Against Torture* (CAT), ICE, U.S. *Bureau of Immigration Affairs* (BIA), and U.S. *Department of Homeland Security* (DHS). When searching in Google or Google Scholar, these italicized search terms may also be helpful.

When searching in a library that uses the Library of Congress subject headings, as many academic libraries do, some of the following subject headings may prove useful:

- Transgender people--Legal status, laws, etc.
- Gender identity--Law and legislation
- Emigration and immigration law.

Anderson, Laurel, Comment, *Punishing the Innocent: How the Classification of Male-to-Female Transgender Individuals in Immigration Detention Constitutes Illegal Punishment under the Fifth Amendment*, 25 BERKELEY J. GENDER L. & JUST. 1–31 (2010).

The focal argument is that trans women immigrants detained by U.S. Immigration and Customs Enforcement (ICE) are detained under conditions that violate the Due Process Clause of the Fifth Amendment. Anderson suggests allowing immigrant detainees to be classified according to their gender identity and limiting the use of administrative segregation (solitary confinement) as an ostensible protection of detainees. Anderson advocates for impact litigation to affect reform and suggests applying legal strategies used by transgender inmates and juvenile detainees in support of detainee claims related to maltreatment during detention.

*Area of Expertise: Lesbian, Gay, Bisexual and Transgender (LGBT) Immigrant Rights*, IMMIGRANT LEGAL RESOURCE CENTER, <https://www.ilrc.org/lgbt-immigrant-rights> (last visited June 7, 2017).

The Immigrant Legal Resource Center works with immigration advocates and trains attorneys who work with immigrants. Training materials regarding LGBT immigrant rights include community resource lists, a webinar on cultural competency, and collections of government FAQs to assist practitioners representing LGBT immigrant clients. Some of the resources on the site require payment.

Benson, Christi Jo, Note, *Crossing Borders: A Focus on Treatment of Transgender Individuals in U.S. Asylum Law and Society*, 30 WHITTIER L. REV. 41–66 (2008).

Written before transgender people were recognized as a “particular social group” for purposes of asylum claims under the Immigration and Nationality Act (INA), this note provides a brief overview of asylum protection. The author also describes difficulties faced by transgender asylum seekers, including discrimination and bias of the immigration judge. Provocatively, Benson evaluates whether a transgender asylum seeker from the United States, seeking asylum in a country applying United States law, would grant relief.

Birdsong, Leonard, “*Give Me Your Gays, Your Lesbians, and Your Victims of Gender Violence, Yearning to Breathe Free of Sexual Persecution...*”: *The New Grounds for Grants of Asylum*, 32 NOVA L. REV. 357–91 (2008).

Birdsong analyzes problems applicants face when seeking asylum, and notes the need for better training for immigration judges, consistency in the interpretation of immigration laws, and the creation of just U.S. Department of Homeland Security (DHS) policies to improve uniformity of results. Further, the author suggests that the U.S. Bureau of Immigration Affairs (BIA) publish more cases and designate them for precedential treatment, so as to improve uniformity of outcomes on applications in various federal jurisdictions.

Gehi, Pooja, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN’S RTS. L. REP. 315–46 (2009).

At a symposium, attorney Gehi shared the experiences typical of her transgender immigrant clients. With that lens, she explains the legal consequences of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) and their effects on immigrants, as well as client difficulties associated with the REAL ID Act. Further, Gehi describes provisions of the REAL ID Act that have an adverse effect on asylum claims. The mass detention of immigrants in U.S. Immigration and Customs Enforcement (ICE) facilities is described as problematic and at times deadly. Gehi includes recommendations for Congress, state

governments, the U.S. Department of Homeland Security (DHS), and attorneys and legal advocates.

Hazeldean, Susan, *Confounding Identities: The Paradox of LGBT Children under Asylum Law*, 45 U.C. DAVIS L. REV. 373–444 (2011).

Focusing largely on the difficulties associated with minors asserting sexual orientation-based asylum claims, the author briefly addresses problematic experiences unique to the minor-transgender-asylum-seeker. In particular, Hazeldean notes that the potential focus of the immigration judge on medical evidence of transgender identity, such as surgical intervention, adversely affects minors' likelihood of success since minors are ineligible for surgical intervention under international medical guidelines. Hazeldean notes as well the double-bind facing transgender asylum seekers: seek refugee protection as a member of the "trans people" social group and risk denial or stifle one's gender identity and base claim on sexual orientation, a recognized social group for purposes of the Immigration and Nationality Act (INA).

Hofmann, Elisabeth, Case Notes, "*Caught in the Crosshairs*": *The Ninth Circuit Applies a Lenient Standard to a Finding of CAT Relief for Transgender Alien in Avendano-Hernandez v. Lynch*, 25 TUL. J.L. & SEXUALITY 171–80 (2016).

In this note, Hofmann pays particular attention to the evidentiary burden on the asylum claimant to prove government involvement in torture to sustain a claim under the Convention Against Torture (CAT). Hofmann notes as well that legalization of same-sex marriage by the United States Supreme Court does not necessarily confer protection over those who are transgender, intersex, or gender nonconforming.

*Immigration Issues*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <http://www.transequality.org/issues/immigration> (last visited June 7, 2017).

The National Center for Transgender Equality site specifically addresses transgender immigration issues. The site includes a link to a 28-page PDF overview of transgender immigration law issues, including family unity, asylum, enforcement and detention, and the challenges transgender immigrants face. Also, the site includes external links to other sites that would be helpful to a researcher interested in transgender immigration issues.

Jenkins, Ellen A., Comment, *Taking the Square Peg out of the Round Hole: Addressing the Misclassification of Transgender Asylum Seekers*, 40 GOLDEN GATE U. L. REV. 67–96 (2009).

In this comment, Jenkins, discusses asylum applications based on sexual orientation and notes that transgender applicants are often erroneously perceived as part of that social group. Jenkins advocates for the use of transgender identity as a “particular social group,” for purposes of asylum claim analysis, arguing that immigration judges place an unfair burden on transgender asylum applicants by forcing them to fit their claims to the particular social group associated with sexual orientation rather than transgender identity. In support of that argument, Jenkins briefly evaluates civil rights case law regarding gender discrimination.

Marouf, Fatma E., *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47–106 (2008).

The author critically reviews the “protected characteristic” and the “social perception” approaches to defining membership in a particular social group for purposes of the Immigration and Nationality Act (INA). Marouf addresses the difficulties arising from the “social visibility” and “social perception” approaches to the analysis, concluding that the “social visibility” approach should be rejected. In addition to evaluating gender and sexual orientation based asylum claims, asylum claims based on family membership, domestic violence, and human trafficking are addressed.

McKinnon, Sara L., *GENDERED ASYLUM: RACE AND VIOLENCE IN U.S. LAW AND POLITICS* (2016).

Gender-based asylum claims from the 1980s onward form the foundation for McKinnon’s analysis. McKinnon reviews a variety of asylum claims, including those of transgender people seeking safety. In particular, the chapter “The Rhetoric and Logic of One Sex, One Gender” raises the critique that judges segregate sexuality from gender for purposes of asylum law, rather than seeing them as intersectional. The narratives relied upon by courts generally reinforce the segregated view of sexuality and gender, and McKinnon’s analysis addresses also how gender-conforming individuals claim protection on the basis of sexual orientation.

O'Day-Senior, Dana, Note, *The Forgotten Frontier-Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention*, 60 HASTINGS L.J. 453–75 (2008).

O'Day-Senior focuses on the rights of transgender persons detained by U.S. Immigration and Customs Enforcement (ICE), particularly addressing medical care rights for transgender detainees. After contextualizing the state and federal prison system policies, O'Day-Senior explains ICE's purpose and policies, making recommendations for improvements to ICE policies to improve access and medically consistent treatment for transgender detainees.

Rumph, Benjamin, *Avendano-Hernandez v. Lynch: Twenty-First-Century Values and Transgender Communities' Impact on Immigration Policy and Foreign Relations*, 24 TUL. J. INT'L & COMP. L. 391–406 (2016).

Rumph begins the note by providing a brief, cogent review of the procedures for detention and removal of aliens as well as the burdens and evaluation of whether an alien is eligible for asylum protection. The note describes and then analyzes the *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (2015), decision, in which a trans woman with two convictions for driving under the influence of intoxicants was properly ineligible for withholding of removal, but was entitled to relief under the Convention Against Torture (CAT).

Shah, Bijal, *LGBT Identity in Immigration*, 45 COLUM. HUM. RTS. L. REV. 100–212 (2013).

Shah critically analyzes inconsistencies in the United States policy as regards LGBT people. Although asylum-based immigration has recognized the “particular social group” claim based sex or identity, partner-based immigration for same-sex couples failed. Shah suggests that the varying treatment is attributable to the asylum claim's basis in status, compared with the partner-based immigration claims based on conduct. Shah calls out the Obama administration's inconsistent decisions to cease to defend the Defense of Marriage Act (DOMA) in the courtroom while enforcing DOMA in an immigration context. The transgender-specific discussion is largely limited to the discussion of DOMA's failure to define “man” and “woman” and thus that valid marriages between opposite members of sex are valid to support a family-based immigration claim.

Southam, Keith, Note, *Who Am I and Who Do You Want Me to Be? Effectively Defining a Lesbian, Gay, Bisexual, and Transgender Social Group in Asylum Applications*, 86 CHI.-KENT L. REV. 1363–88 (2011).

Focusing specifically on the asylum application, Southam explains possible likely approaches of the immigration judge evaluating an LGBT claim: status versus conduct; mutable versus immutable; and social perception and social visibility. Southam offers drafting suggestions for practitioners.

Sussman, Aaron, *Expanding Asylum Law's Pattern-or-Practice-of-Persecution Framework to Better Protect LGBT Refugees*, 16 U. PA. J.L. & SOC. CHANGE 111–32 (2013).

The author, a federal court clerk, suggests that the pattern-or-practice-of-persecution framework of analysis for an asylum claim is consistent with assessing persecution on the basis of membership in an LGBT social group. Drawing on *Bromfield v. Mukasey*, 543 F.3d 1071 (2008), Sussman suggests factors to consider when evaluating pattern-or-practice-of-persecution claims, including the existence of the following in the claimant's country of origin: anti-LGBT laws, anti-LGBT culture, mob violence, police complicity, public outing performed as a weapon, and the presence of mixed motives behind persecution.

Turney, C.T., Comment, *Give Me Your Tired, Your Poor, and Your Queer: The Need and Potential for Advocacy for LGBTQ Immigrant Detainees*, 58 UCLA L. REV. 1343–88 (2011).

Turney brings attention to the need to advocate for improved conditions in immigration detention centers for detainees who identify as LGBTQ. The author calls for improvements to come from legislative and regulatory action, noting the limited likelihood of developing strong precedent through the courts. Detention concerns described include: increased violence at the hands of other detainees as well as lack of adequate physical and mental health care.

U.S.: *Transgender Women Abused in Immigration Detention Face Sexual Assault, Solitary Confinement*, HUMAN RIGHTS WATCH (March 23, 2016 12:55 PM), <https://www.hrw.org/news/2016/03/23/us-transgender-women-abused-immigration-detention>.



Human Rights Watch provides both an overview and a detailed (68 page) report regarding the treatment of transgender women in U.S immigration detention. The detailed report addresses specific issues including access to medical care, solitary confinement, sexual assault, and segregated detention. The report includes case studies, vocabulary, and recommendations.

Wayne, Adena L., Note, “*Unique Identities and Vulnerabilities*”: *The Case for Transgender Identity as a Basis for Asylum*, 102 CORNELL L. REV. 241–69 (2016).

Wayne defines “transgender,” “sexual orientation,” and “particular social groups,” noting that courts have in the past conflated gender identity and sexual orientation. After explaining why attorneys may choose to assert sexual orientation as the basis of a “particular social group” asylum claim, Wayne argues for United States law to recognize transgender people as a particular social group. Further, Wayne argues that recognizing transgender people as a particular social group would support more broadly defining cisgender women as members of a particular social group.

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Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027 (1984)